

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RACCAGNA FOODS INC.	:	DETERMINATION
AND GRACE RACCAGNA	:	DTA NOS. 820548
	:	AND 820558
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 2000 through	:	
November 30, 2003.	:	

Petitioners, Raccagna Foods, Inc., and Grace Raccagna, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2000 through November 30, 2003.

A consolidated hearing was commenced before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 14, 2006 at 10:30 A.M., continued at the same location on November 2 and 3, 2006 and continued to conclusion at the same location on April 30, 2007, with all briefs to be submitted by February 1, 2008, which date began the six-month period for the issuance of this determination. Petitioners appeared at the April 14, 2006 hearing by Michael Alexander, Esq., and thereafter by Barry Leibowicz, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether Raccagna Foods, Inc., has shown error in either the audit method or result.

II. Whether Grace Raccagna was a person responsible for the collection and payment of sales and use taxes on behalf of Raccagna Foods, Inc., within the meaning and intent of Tax Law § 1131(1) and § 1133(c), and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

III. Whether penalties were properly imposed.

FINDINGS OF FACT

1. Petitioner Raccagna Foods Inc. (Raccagna) owned and operated the Italian Buffet Restaurant located at 160 Adams Avenue, Hauppauge, New York, within an industrial park. Raccagna, incorporated on October 16, 2000, purchased the business from GCAGCA, Inc. (GCAGCA) on December 26, 2000. The stockholders of GCAGCA and Raccagna were not identical. Raccagna offered an Italian hot and cold buffet (sold by the pound), pizza, heroes, and calzones to either eat in or take out. It also offered a catering menu for home and office parties, consisting of pasta and seafood items, and various entrees.

2. On July 28, 2003, the Division of Taxation (Division) assigned an experienced auditor, Robert Lawrence, to conduct a sales and use tax field audit of Raccagna for the period December 1, 2000 through May 31, 2003. Petitioner was selected for audit based upon the recommendation of the Division's auditor assigned to audit the previous owner of the business. Mr. Lawrence's handwritten notes, dated July 28, 2003, in Raccagna's Tax Field Audit Record (audit log) indicate that the first waiver of the period of limitations on assessment was due by March 20, 2004.¹

¹ A waiver for the period December 1, 2000 through February 28, 2001, the first quarter in the audit period, was due because the sales and use tax return for that quarter was timely filed.

3. The Division's auditor sent an appointment letter to Raccagna, dated August 4, 2003, which stated that its sales and use tax records for the period December 1, 2000 through May 31, 2003 had been scheduled for a field audit beginning September 9, 2003 at Raccagna's office. The letter further advised that all books and records pertaining to Raccagna's sales and use tax liability for the audit period must be available on the appointment date, and a "Records Requested List," containing a "detailed list of all records required to be available for audit on the appointment date," was attached to the letter. Among the records specifically requested in the Records Requested List were the general ledger, cash receipts journal, federal income tax returns, sales tax returns, purchase invoices, sales invoices, bank statements, financial statements and exemption documents.

4. On August 6, 2003, the auditor received a telephone call from Raccagna's accountant, Jay Oher, CPA, who confirmed the September 9, 2003 appointment at his firm's offices. A power of attorney appointing Mr. Oher, State Tax Consulting, Inc., to represent Raccagna was executed by Grace Raccagna, President, on August 6, 2003, and was submitted to the auditor.

5. A copy of an anonymous letter, dated April 11, 2001, alleging that the Italian Buffet Restaurant was incorrectly charging sales tax on food purchases (squeal letter) was included in the case file when it was initially assigned to the auditor. On September 2, 2003, the auditor had lunch at the Italian Buffet and received a cash register receipt for his food and beverage purchase, which items he consumed on the premises. Subsequently, the auditor attached this cash register receipt to the copy of the squeal letter in his file, and noted in the file that the correct amount of sales tax was charged. At the suggestion of his supervisor, approximately two weeks after his September 2nd lunch visit, the auditor inserted a reference to the lunch visit into the audit log, noting that he "went to business - very busy." During his September 2, 2003 lunch at the

premises, the auditor did not obtain a take-out menu. The auditor's food and beverage purchase was properly reflected on Raccagna's master cash register tape for September 2, 2003.

6. On September 9, 2003, a field audit appointment was conducted at Mr. Oher's office. Documents provided by Mr. Oher for review by the auditor on that date were placed in the conference room used by the auditor to conduct his initial review of the corporation's records. The auditor did not inventory the records provided for his review by Mr. Oher at this field audit appointment. Rather, the auditor transcribed from the corporation's detailed general ledger information concerning sales for the months ending December 31, 2000 through April 30, 2003, sales tax payable for the quarters ending February 28, 2001 through February 28, 2003, purchases and a detail of the purchases by vendor for the months ending December 31, 2000 through May 31, 2003. The auditor also transcribed information about deposits from the corporation's Chase checking account split-month bank statements for the months ending December 31, 2000 through April 30, 2003. Among the records placed in the conference room for the auditor's review was a garbage bag of purchase invoices. Mr. Lawrence did not review the contents of this bag because he was unaware of its existence during that field audit appointment.

7. At the September 9, 2003 audit appointment, the auditor and Mr. Oher discussed Raccagna's records, which Mr. Oher claimed were adequate. During their discussion, the auditor requested the corporation's daybook, and Mr. Oher responded that there was no daybook. The auditor was given unsigned copies of the corporation's federal income tax returns for an S corporation (forms 1120S) for the years 2001 and 2002 to take with him at the end of the audit appointment. A review of the audit log indicates that the next audit appointment was scheduled for December 11, 2003. The auditor did not make any notations concerning cash register tapes in

his handwritten field audit visit notes or in his handwritten audit log entry concerning the September 9, 2003 field audit appointment.

8. On December 2, 2003, Mr. Oher called the auditor and cancelled the December 11, 2003 field audit appointment because he had a formal hearing at the Division of Tax Appeals in Troy, New York. A new audit appointment was not scheduled during that telephone call.

9. Subsequently, the auditor was advised of the bulk sale of Raccagna's business in a memo from the Division's desk audit section on December 31, 2003. This memo further advised that based upon the date of sale provided on the Bulk Sale Notification, "the assessment for any additional taxes determined to be due on field audit of [Raccagna] must be posted on [the case tracking system] by 2/17/2004," in order for desk audit to timely assess the purchaser as the associated responsible person. On January 2, 2004, the auditor received an e-mail reminder from desk audit that the field audit results were needed by February 17, 2004 in order to timely assess the purchaser.

10. Upon receiving notification of the bulk sale, the auditor called Mr. Oher's office on December 31, 2003 and left a message. The auditor also prepared an appointment letter dated December 31, 2003, in which he advised the corporation's representative that the audit period was being expanded to include the corporation's sales and use tax records for the subsequent updated period June 1, 2003 through November 30, 2003 and that a field audit to review the additional records was scheduled for January 15, 2004 at Raccagna's offices. This letter further advised that, in addition to the records previously requested for audit, all books and records pertaining to the sales and use tax liability for the updated audit period must be available on the appointment date, and a Records Requested List was attached to the letter. This list for the amended audit period December 1, 2000 through November 30, 2003 contained a detailed list of

the same records requested for the original audit period. Although the auditor addressed this letter to Mr. Oher's Forest Hills office, the United States Postal Service failed to deliver this appointment letter to him, and it was returned to the Division's Suffolk District Office on January 14, 2008. The auditor failed to note the return of this appointment letter as undeliverable in his audit log.

11. On January 5, 2004, the auditor reviewed the audit results of the previous owner, which were based upon outside observations. The auditor used the results of that prior audit to calculate Raccagna's taxable sales for the period December 1, 2000 through November 30, 2003. In the audit of the previous owner, the Division assessed sales tax in the amount of \$214,534.00 on additional taxable sales of \$2,923,806.00 for the period December 1, 1997 through November 30, 2000, a total of 12 quarters. Subsequently, the assessment was reduced by \$35,755.69, to reflect that the restaurant was open only five days per week rather than six days per week as presumed in the audit determination. Since there were 12 quarters in each of the audit periods, Mr. Lawrence divided the reduction in tax in the prior audit (\$35,755.69) by the tax rate at the time (8.25%) which resulted in a reduction in the amount of \$433,402.30 to taxable sales. He then subtracted that amount from the \$2,923,806.00 in taxable sales determined on the prior audit of the former owner and arrived at net taxable sales of \$2,490,403.70 for the 12-quarter audit period. Next, he divided the net taxable sales, \$2,490,403.70, by the 12 quarters and computed taxable sales per quarter in the amount of \$207,533.64, which amount was used by the auditor as Raccagna's estimated quarterly taxable sales. For each of the 12 quarters in the subject audit period, the auditor compared the estimated quarterly taxable sales to the reported quarterly taxable sales to calculate additional taxable sales. This amount was then multiplied by the tax rate in effect at the time to arrive at additional tax due in each quarter.

12. On January 8, 2004, Raccagna's representative called the auditor and stated that the corporation had adequate records and a daybook which he would provide to the auditor at a meeting scheduled for February 6, 2004. During that telephone conversation, the representative and the auditor discussed the bulk sale of Raccagna's business, but the auditor neither requested any waiver of the period of limitations, nor asked for information about the purchaser.

13. On January 20, 2004, the auditor prepared the case tracking system upload of the assessment and issued to Raccagna a Statement of Proposed Audit Change for Sales and Use Tax for the period December 1, 2000 through November 30, 2003 asserting tax due in the amount of \$162,610.67 plus penalty and interest. The proposed penalties were computed pursuant to Tax Law § 1145(a)(1)(i) and (vi). The auditor sent the statement and two pages of work papers to petitioner's representative on January 21, 2004 by certified mail. The auditor also included an undated memo addressed to Mr. Oher which stated:

The enclosed Au-346 [sic] is based on information available to date. Information presented and examined at the next appointment scheduled for 2/6/04, may result in adjustments to the proposed tax due. Considering the limited documentation presented thus far, might I suggest that all detailed sales records are made available on this date. This would entail, but not be limited to, all cash register tapes and daybooks for the audit period (12/01/00 - 11/30/03).

The first page of the included work papers is merely a breakdown of the estimated tax due in each of the quarters ending between February 28, 2001 and November 30, 2003. The second page entitled, "x-050447927, notes from prior audit, assessment # L019094631," contains limited details of a computation of quarterly taxable sales.

14. The auditor prepared an appointment letter dated January 20, 2004, advising the corporation's representative that the audit period was being expanded to include sales and use tax records for the period June 1, 2003 through November 30, 2003 and that a field audit to review

the additional records was scheduled for February 6, 2004 at Raccagna's offices. This letter further advised that, in addition to the records previously requested for audit, all books and records pertaining to the sales and use tax liability for the updated audit period must be available on the appointment date. A detailed Records Requested List was attached to the letter. The records specifically requested on this list for the amended audit period December 1, 2000 through November 30, 2003 did not include cash register tapes or daybooks. Instead, the list contained a detailed list of the same records requested for the original audit period by the initial appointment letter dated August 4, 2003. This letter was sent by certified mail to Mr. Oher.

15. In a letter to the auditor dated February 2, 2004, Mr. Oher expressed surprise at the issuance of the statement of proposed audit change when an audit appointment was scheduled for February 6, 2004, and petitioners' representative had already provided all of the documentation that the auditor requested. Mr. Oher stated that he needed more time to compile the appropriate data, i.e., cash register tapes and data for the extended audit period, because "now and out of the blue for the very first time you request cash register tapes" and "[a]dditionally, you now seek updated records for an additional time frame." He further stated that the additional time necessary to respond to the new expanded request required putting off the audit appointment scheduled for February 6, 2004 until early March since the "documentation you now seek is quite voluminous in nature." In addition, Mr. Oher requested that the statement of proposed audit change be withdrawn because it was based on flawed assumptions and was premature in nature. The sales tax section of the Division's Suffolk District Office received this letter on February 4, 2004.

16. On February 3, 2004, petitioners' representative called the auditor and cancelled the February 6, 2004 appointment because he needed time to compile the additional requested books

and records, including cash register tapes, in a manner which would allow the auditor to efficiently review them. During that telephone conversation, the February 6, 2004 audit appointment was rescheduled for March 3, 2004. The auditor added officer information to the upload for assessment on February 3, 2004, and the auditor's team leader released the upload for assessment on February 6, 2004. Subsequently, on February 9, 2004, the auditor issued an appointment letter to Raccagna's representative confirming the scheduled field audit, beginning March 3, 2004, of the corporation's sales and use tax records for the audit period December 1, 2000 through November 30, 2003. This letter further advised that all books and records pertaining to the sales and use tax liability for the audit period must be available on the appointment date. The Records Requested List attached to this letter contained a detailed list of the same records requested by the appointment letter dated January 20, 2004.

17. In anticipation of his March 3, 2004 audit appointment with Mr. Lawrence, Mr. Oher obtained the documentation requested by the auditor for the updated audit period, including, among other things, Raccagna's daybook and cash register tapes organized by month and year.

18. On February 9, 2004, the auditor notified the Division's desk audit section by e-mail that Raccagna's assessment would be issued shortly. The Division issued a Notice of Determination to Raccagna Foods, Inc., dated February 19, 2004, asserting additional sales and use taxes due in the amount of \$162,610.67 for the period December 1, 2000 through November 30, 2003, plus interest in the amount of \$36,079.64 and penalty in the amount of \$55,114.39, for a balance due of \$253,804.70. On March 12, 2004, the Division issued a Notice of Determination against Grace Raccagna, as an officer or responsible person of Raccagna Foods, Inc., asserting sales and use tax due of \$162,610.67 for the period December 1, 2000 through November 30, 2003 plus penalty of \$56,097.37 and interest of \$37,686.18 for a balance due of

\$256,394.22. Each of the statutory notices assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi).

19. P & L Nanan Corp. purchased Raccagna's business on December 3, 2003, and notified the Division of such bulk sale purchase on December 8, 2003. The Division also timely assessed P & L Nanan Corp. as the bulk sale purchaser pursuant to Tax Law § 1141(c).

20. On March 1, 2004, Raccagna's representative called the auditor and cancelled the March 3, 2003 audit appointment. Subsequently, on March 2, 2004, the auditor received a letter dated February 24, 2004 from Raccagna's representative cancelling the March 3, 2004 meeting. This letter further stated that the Raccagna matter would proceed to the Bureau of Conciliation and Mediation Services.

21. Raccagna operated as a cash business and used cash register tapes rather than sales invoices for its sales transactions. As such, the auditor knew he was supposed to ask for cash register tapes specifically and separately from any request for sales invoices. The initial appointment letter to Raccagna, dated August 4, 2003, was generated based upon information selected by the auditor and entered into the Division's computer system. Because he failed to select cash business, the detailed records requested in the August 4, 2003 appointment letter did not include cash register tapes. The auditor never corrected his mistake, and all subsequent audit appointment letters failed to include a specific and separate request for cash register tapes.

22. The auditor prepared a Tax Field Audit Report (audit report) for Raccagna for the audit period December 1, 2000 through November 30, 2003. The report states that a daybook and other detailed sales records were requested on August 5, 2003 and December 31, 2003 but were not made available. The report also states that waivers of the period of limitations were not necessary because "there were no periods due to expire." In the additional information section of

the audit report, the auditor states that he compared Raccagna's gross sales per its books to sales on its sales tax returns and federal income tax returns and found the sales "were in basic agreement."

23. At the hearing, the auditor admitted that his audit report contained numerous erroneous or misleading entries including, among other things, dates that requests for records were made, specific records requested, and dates on which statutory periods were due to expire.

24. On page 4 of the audit report labeled "Section 1 - Review of Sales Records," part of the narrative was altered and deleted by the auditor's supervisor after it was submitted to him by the auditor. The supervisor's alteration is visible only on the original of the audit report. At the hearing, the auditor confirmed that his supervisor did not personally participate in this audit.

25. In making his determination to assess Ms. Raccagna as a responsible person, the auditor reviewed the Division's taxpayer identification database and the power of attorney appointing Mr. Oher to represent Raccagna in the audit. The auditor never contacted Ms. Raccagna regarding her role, if any, in the business. He also did not make any inquiries of Mr. Oher regarding Ms. Raccagna's role, if any, in the business. The auditor prepared a Responsible Person Questionnaire for Ms. Raccagna on March 15, 2004 because it was a form needed to close out the file. At the hearing, the auditor was unable to identify the source of the information contained in the Division's taxpayer identification database.

26. At the hearing, the auditor admitted that the Notice of Determination was issued to Raccagna on February 19, 2004 because he did not want to let the period of limitations on assessment expire against the purchaser and he could not assess the purchaser without assessing Raccagna.

27. The record in this matter closed at the conclusion of the consolidated hearing on April 30, 2007. On December 5, 2007, along with its brief, the Division of Taxation submitted six documents. The first three of these documents bore the heading “receipts, sales and sales tax per cash register tapes” and the date “08/06/2007,” and the fourth document bore the heading “sales per daysheets” and the date “08/06/2007.” The remaining two documents were copies of documents already in evidence as part of the Division’s Exhibit H. Since the record in this matter closed on April 30, 2007, the first four documents, each dated “08/06/2007,” were returned to the Division of Taxation with an explanation that no evidence could be submitted after the record was closed. (*See Matter of Saddlemire* Tax Appeals Tribunal, June 14, 2001.)

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][I]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.* (*supra*), as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), 'from which the exact amount of tax due can be determined' (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case' (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

C. It is clear from the record that the Division did not make a request for the corporation's cash register tapes for the audit period December 1, 2000 through November 30, 2003 before resorting to external indices to estimate the tax due. Although the initial audit appointment letter dated August 4, 2003 requested numerous records, it failed to specifically request cash register

tapes for the original audit period December 1, 2000 through May 31, 2003. At that initial audit appointment, the auditor was provided with books and records which he transcribed and later reconciled. During that appointment, the auditor orally requested the corporation's daybook, and Mr. Oher responded that there was no daybook. Although the auditor testified at the hearing that he orally requested the cash register tapes for the period December 1, 2000 through May 31, 2003 during the September 9, 2003 audit appointment, there is no documentary evidence to support his claim. Subsequently, on January 8, 2004, Mr. Oher orally advised the auditor that the corporation did have a daybook, which would be available for review by the auditor at an audit appointment they scheduled for February 6, 2004. The Division's first request for cash register tapes for the period December 1, 2000 through November 30, 2003 was made in an undated memo which accompanied the Statement of Proposed Audit Change for Sales and Use Tax issued to Raccagna on January 20, 2004. In this same memo, the auditor also requested the daybook for the period at issue. As noted above, this statement of proposed audit change was based on external indices. On January 20, 2004, a separate audit appointment letter expanding the audit period to include the updated period June 1, 2003 through November 30, 2003 was sent to Raccagna's representative. While this appointment letter requested that records for the expanded audit period be produced at the audit appointment scheduled for February 6, 2004, it did not specifically request cash register tapes or the daybook. Due to the volume of records requested for the expanded audit period December 1, 2000 through November 30, 2003, Raccagna's representative requested that the audit appointment be rescheduled for March 3, 2004. An audit appointment letter dated February 9, 2004 confirmed the audit of Raccagna's records for the period December 1, 2000 through November 30, 2003 beginning March 3, 2004. This audit appointment letter did not specifically request Raccagna's cash register tapes and

daybook for the period at issue. Thus, the only request for Raccagna's cash register tapes was made by the auditor in the undated memo that accompanied the statement of proposed audit change mailed to the corporation's representative on January 21, 2004. Subsequently, the Division issued a Notice of Determination to Raccagna on February 19, 2004 and a Notice of Determination against Grace Raccagna on March 12, 2004. Given the erroneous and misleading statements in the audit report regarding the specific records requested and the dates of such requests, it is clear that the auditor was fully aware that he could not resort to external indices without making an adequate request for Raccagna's books and records for the entire audit period.

Accordingly, the Division's resort to external indices for the audit period December 1, 2000 through November 30, 2003 violates the rule stated in *Matter of Christ Cella* that the Division must first request the taxpayer's books and records for the entire audit period and then review them before determining that it is virtually impossible to verify taxable sales receipts and conduct a complete audit (*see also Matter of Chartair, Inc.; Matter of Your Own Choice, Inc.*). As such, the use of the audit of the previous owner of the business to estimate the tax due was improper.

D. Issues II and III are rendered moot.

E. The petition of Raccagna Foods, Inc., is granted, and the Notice of Determination dated February 19, 2004 is cancelled. The petition of Grace Raccagna is granted, and the Notice of Determination dated March 12, 2004 is cancelled.

DATED: Troy, New York
July 31, 2008

/s/ Winifred M. Maloney_____
ADMINISTRATIVE LAW JUDGE